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No. 77-651

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not yet reported. The decision of the Federal Communications Commission (Pet. App. 1b-30b) is reported at 55 FCC 2d 416. The opinion and order of the Federal Communications Commission denying a petition for rehearing (Pet. App. 1c-7c) is reported at 55 FCC 2d 663. The decision of the Commission's Administrative Law Judge (Pet. App. 1d-154d) is reported at 55 FCC 2d 43.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1e) was entered on July 8, 1977. A timely petition for rehearing *en banc* was denied on August 8, 1977 (Pet. Apps. 1f, 1g). The petition for a writ of certiorari was filed on November 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission's decision to deny petitioner's license renewal application was supported by substantial evidence.

2. Whether the court of appeals was required to decide constitutional questions raised by petitioner.

STATEMENT

Petitioner United Broadcasting Company is the licensee of radio station WOOK in Washington, D.C. In 1969 the Commission designated petitioner's application for renewal of its license for evidentiary hearing pursuant to 47 U.S.C. 309(e). *United Television Co., Inc.*, 18 FCC 2d 363. The hearing focused on three issues: (1) whether petitioner had violated the technical and engineering rules of the Commission and, if so, whether those violations "reflect[ed] such negligence, carelessness, ineptness or disregard of the Commission's processes that the Commission [could not] rely upon [petitioner] to fulfill the duties and responsibilities of a licensee" (Pet. App. 4d-5d); (2) whether petitioner had taken adequate measures to protect its listeners from false, misleading and deceptive advertising on the station; and (3) whether broadcasts of announcements concerning lotteries had been made on the station in violation of 18 U.S.C. 1304.[1]

[1]In addition to issues concerning petitioner's qualifications to remain a Commission licensee, the hearing also involved comparative issues raised by a competing application that was mutually exclusive with petitioner's renewal application for WOOK (see Pet. App. 4d). The administrative law judge, finding both applicants qualified, denied petitioner's application and granted that of the competing applicant on the basis of comparative considerations (Pet. App. 151d-152d). The Commission, however, held that the judge had erred in concluding that petitioner was entitled to comparative consideration

After a full evidentiary hearing, the administrative law judge concluded that petitioner had repeatedly violated the Commission's rules for technical operation of the station and that similar violations had been the subject of earlier Commission sanctions. See note 3, *infra*. Because of petitioner's "carelessness and negligence" in the operation of the station, and because petitioner's past performance demonstrated that "little, if any, reliance can be placed in the effectiveness of the new proposals now made to assure future technical compliance," the judge concluded that petitioner's application for renewal of the license should be denied (Pet. App. 144d, 153d).

On review, the Commission held that petitioner was not qualified to be a licensee for three independent reasons. First, it had broadcast lottery information in violation of 18 U.S.C. 1304 (Pet. App. 4b-13b). Second, it had failed to take reasonable measures to protect its listeners from false and misleading advertising for "roots," "incense" and "spiritual baths" over its facilities (Pet. App. 14b-16b). Finally, it had a long history of violations of the Commission's engineering and technical operating rules (Pet. App. 16b-17b). With respect to the violations of the engineering and technical rules, the Commission held that petitioner's "previous history of operations of WOOK [had] been replete with violations of the technical rules

(Pet. App. 3b). Thus the comparative issues formed no part of the Commission's decision.

The hearing proceeding initially involved the license renewal of petitioner's television station as well. Subsequently, that part of the proceeding was severed. See *United Television Co., Inc.*, 46 FCC 2d 698, affirmed 514 F. 2d 279 (C.A. D.C.), petition for rehearing dismissed, 61 FCC 2d 469.

* * *, that [petitioner's] past representations were of no value, [and] that no reliance [could] be placed on its present promises of future compliance * * *" (Pet. App. 16b-17b).[2]

In a *per curiam* opinion, the court of appeals affirmed the Commission's denial of the renewal application, holding that, "[I]n our view, the long history of persistent violations of those rules was a sufficient reason for disqualification" (Pet. App. 2a). The court of appeals specifically declined to consider any "other question tendered by this appeal" (*ibid.*).

ARGUMENT

The court of appeals' decision was correct. This case presents no question of general importance requiring review by this Court.

1. The Commission's decision that petitioner could not be relied upon to operate the station in accordance with the Commission's rules and, therefore, that renewal of the license would not serve the public interest is reasonable and is supported by substantial evidence in the record.[3]

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[2]The Commission found that petitioner's previous representations of efforts to conform the operation of the station to the Commission's regulations had been "merely 'window dressing' employed when WOOK's license was placed in jeopardy" (Pet. App. 17b).

[3]While petitioner now challenges the correctness of the Commission's decision on this point (Pet. 16-19), it did not argue this issue in the court of appeals. Cf. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16.

In any event, the argument is without merit. Petitioner attempts to minimize its violations of the Commission's rules for technical operation by characterizing them as "the mere assertion of 'technical' factors" (Pet. 13), or as "minor technical violations" (*id.* at 22). In fact, the administrative law judge's initial decision demonstrated a substantial number of violations (see Pet. App. 56d-92d). Moreover,

This Court recognized in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 375-377, the "chaos" that existed prior to effective federal regulation of broadcasting. Indeed, the core of the Commission's responsibility is the regulation of technical operation. If it fails in that responsibility, and stations cannot effectively communicate, any other regulation becomes meaningless. Regulation of technical operation is therefore a vital part of the Commission's regulatory duty. Thus, petitioner's assertion that violations of those rules do "not pose any * * * threat to the FCC's ability to regulate" (Pet. 22) is wrong. A licensee's failure to conform to the regulations, particularly where, as here, that failure continues after strong warnings, compels corrective action. Although petitioner correctly notes that such violations are "customarily treated by the FCC as grounds for reprimand or civil forfeiture" (*ibid.*), the Commission had already reprimanded petitioner in an

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the Commission concluded that the judge had erred in failing to find a number of additional violations (see Pet. App. 25b-28b). The Commission rejected petitioner's attempt to minimize each individual violation: "The record establishes each of the violations, and while, if considered singly, they would not warrant the sanction imposed here, when considered as a whole and in conjunction with [petitioner's] prior violations, they become decisionally significant" (*id.* at 22b).

Furthermore, similar violations had required the Commission to hold a hearing on petitioner's 1966 renewal application for WOOK, which resulted in the forfeiture of $7,500. *United Broadcasting Co., Inc.*, 4 FCC 2d 293. This history of persistent violations of the rules was an important consideration in the decision of the administrative law judge (Pet. App. 146d-148d), the Commission (Pet. App. 16b-17b) and the court of appeals (Pet. App. 2a). "[A]n applicant's past record of station maintenance and supervision is clearly relevant to a public interest determination in a subsequent licensing proceeding." *Friendly Broadcasting Co.*, 34 FCC 2d 947, 949.

earlier license renewal proceeding and had issued a civil forfeiture; yet the violations continued. The Commission has clearly and repeatedly stated that it will not continue to use mild sanctions for repeated misconduct. If those sanctions have been imposed, and the licensee spurns the opportunity to improve its performance, nonrenewal is the proper course. See *United Broadcasting Co. of Florida, Inc.*, 55 FCC 2d 832, 841, reconsideration denied, 60 FCC 2d 816, 820; *Star Stations of Indiana, Inc.* 51 FCC 2d 95, 96-97, 109, affirmed *sub nom., Star Broadcasting Inc.* v. *Federal Communications Commission*, 527 F. 2d 853 (C.A. D.C.), certiorari denied, 425 U.S. 992.

2. There is no occasion for this Court to reach petitioner's contention (Pet. 13-16) that the Commission required it "to establish that claims made in [its] religious broadcasts were true [and] that [the] spiritual teachings, if followed, [would] produce the promised result." That contention was not reached by the court of appeals, which upheld the Commission's decision solely on the basis of petitioner's repeated technical broadcasting violations.

In any event, the contention is without merit. The Commission (Pet. App. 7b):

> agree[d] with [petitioner] that the truth of a sincerely held religious belief may not be questioned. There are, however, limits on the activities which may be carried on in the name of religion, and it is well settled that conduct which is in violation of social duties or law may be prohibited.

The Commission concluded (Pet. App. 14b-15b; footnotes omitted):

> [O]fferings of "roots," "incense" and "spiritual baths" constituted false advertising. * * * [R]epresentations which accompanied the offers of these articles, were without religious or factual basis. * * * We recognize that it is not within the province of this Commission to question the truth of the professed beliefs of these ministers. We can, however, question the sincerity of those beliefs and of their representations, and * * * we conclude that there is no valid basis, in religion or otherwise, for the claims * * * which accompanied the offers of the "roots," "incense" and "spiritual baths." * * * Based on this record we find that the repeated broadcast offers of "roots," "baths" etc., together with promises of financial blessings and solutions to personal problems were false and misleading, that [petitioner] continually failed to take reasonable measures to protect its listeners from such use of its facilities and that this use of [petitioner's] facilities also mandates the denial of its renewal application.

3. Petitioner's argument that certiorari should be granted because the court of appeals declined to decide the constitutional question that was also presented (Pet. 10-16) is unsound. Constitutional questions should not be decided unless it is necessary to do so. *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-573. See also *Hayburn's Case*, 2 Dall. 409; *Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105.

Therefore, since the court of appeals concluded that the Commission's action could be upheld solely on the basis of petitioner's noncompliance with technical requirements, it was not required to reach the constitutional question tendered unless the assertedly religious nature of petitioner's broadcasts somehow excused it from compliance with technical requirements. That is plainly not the law (see *e.g., Prince* v. *Massachusetts,* 321 U.S. 158), and petitioner does not argue that it is.

Beyond this, however, petitioner's claim (Pet. 19) that the Commission's action was "a pretext for the exercise of control over the content of religious programming" is baseless. The Commission found—and indeed petitioner conceded —that three-digit "scripture citations" which were offered for sale over petitioner's facilities were in fact intended to be used, and were used, by purchasers in illegal "numbers" lotteries (Pet. App. 4b-5b). And, as noted above, the Commission also found that various advertisements for "roots," "incense" and "spiritual baths" were false and misleading (Pet. App. 14b-16b). Both of these findings—as well as the findings of noncompliance with technical requirements—were based on substantial evidence (Pet. App. 11d-49d, 56d-92d).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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